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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RICHARD ANTHONY SMITH,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

G045119

(Super. Ct. No. M9531)

O P I N I O N

Original proceedings; petition for a writ of mandate/prohibition to challenge an order of the Superior Court of Orange County, Richard M. King, Judge. Petition granted.

Deborah A. Kwast, Public Defender, Frank Ospino, Interim Public Defender, Jean Wilkinson, Chief Deputy Public Defender, Denise Gragg and Mark S. Brown, Assistant Public Defenders, for Petitioner.

No appearance for Respondent.

Tony Rackauckas, District Attorney, and Elizabeth Molfetta, Deputy
District Attorney, for Real Party in Interest.

* * *

INTRODUCTION

Richard Anthony Smith is the subject of a commitment petition filed pursuant to the Sexually Violent Predator Act, Welfare and Institutions Code section 6600 et seq. (SVPA).¹ He filed a plea in abatement in the trial court, seeking dismissal of the SVPA commitment petition on the ground it was not supported by the concurrence of the two evaluators appointed pursuant to section 6601 after our decision in *In re Ronje* (2009) 179 Cal.App.4th 509 (*Ronje*). His petition for writ of mandamus/prohibition challenges the trial court's order denying his plea in abatement. Smith also challenges the trial court's order granting the district attorney's motion to compel him to undergo a mental evaluation by the district attorney's retained mental health professional and to grant that mental health professional access to his state hospital records.

Following our decision in *Reilly v. Superior Court* (Mar. 28, 2012, G045118) __ Cal.App.4th __ (*Reilly*), we are compelled under the SVPA to grant the writ petition because the two post-*Ronje* evaluators concluded Smith no longer meets the criteria for commitment as a sexually violent predator. We direct the trial court to dismiss the SVPA commitment petition against Smith and to deny the district attorney's motion (1) to compel him to undergo a mental evaluation by the district attorney's retained mental health professional and (2) to allow that mental health professional access to Smith's state hospital records.

¹ Further code references are to the Welfare and Institutions Code unless otherwise indicated.

ALLEGATIONS OF THE PETITION AND THE RETURN

In March 2002, the Orange County District Attorney filed a petition for commitment as a sexually violent predator (the SVPA Petition), alleging Smith was a sexually violent predator under the SVPA. Attached to the SVPA Petition were an evaluation of Smith conducted by Dana Putnam, Ph.D., in January 2002 and an evaluation conducted by Charles Jackson, Ph.D., in February 2002.

In March 2002, Judge Ronald Kreber reviewed the SVPA Petition and found it stated sufficient facts which, if true, would constitute probable cause to believe Smith was likely to engage in sexually violent predatory criminal behavior on his release from prison. As a consequence, Judge Kreber ordered Smith to be detained pursuant to section 6601.5 in a secured facility until the probable cause hearing.

In 2006, one updated evaluation and one replacement evaluation of Smith were conducted pursuant to section 6603, subdivision (c)(1). Nancy Rueschenberg, Ph.D., conducted the replacement evaluation and concluded Smith continued to meet the criteria for commitment as a sexually violent predator. Dr. Putnam conducted the updated evaluation. The record does not reveal Dr. Putnam's conclusion in the updated evaluation. In February 2007, Smith waived his right to a probable cause hearing after it had been continued several times. Trial on the SVPA Petition has not been held.

In August 2008, the state Office of Administrative Law (OAL) issued 2008 OAL Determination No. 19, in which the OAL determined the 2007 version of the State Department of Mental Health's (DMH) assessment protocol amounted to an "underground regulation" because portions of the assessment protocol, though regulatory in nature, had not been adopted pursuant to the Administrative Procedure Act, Government Code section 11340.5. (See *Ronje, supra*, 179 Cal.App.4th at p. 515.) In

Ronje, *supra*, 179 Cal.App.4th at pages 516-517, we agreed with the OAL and likewise concluded the 2007 assessment protocol was invalid as an underground regulation.

In 2009, the DMH drafted a new standardized assessment protocol for SVPA evaluations. Pursuant to Government Code section 11349.6, subdivision (d), the OAL approved the new assessment protocol in September 2009.

In March 2010, Smith filed a motion requesting, among other things, that in light of *Ronje*, the trial court order new evaluations to be conducted to determine whether he is a sexually violent predator. In November 2010, Judge Patrick Donahue granted the motion and ordered new evaluations of Smith, pursuant to section 6601, and a new probable cause hearing pursuant to *Ronje* based on the new evaluations.

In compliance with the court order, the DMH appointed Dr. Putnam and Dr. Rueschenberg to conduct the new evaluations. In a report dated February 2, 2011, Dr. Rueschenberg concluded Smith no longer met the criteria for commitment as a sexually violent predator. In a report dated February 7, 2011, Dr. Putnam also concluded Smith no longer met those criteria.

At the pretrial hearing in March 2011, Smith requested his probable cause hearing be set within 10 calendar days. Judge Richard M. King denied the request. Later that month, the district attorney filed a motion for an order compelling Smith to undergo a mental examination by the district attorney's retained expert, Harry Goldberg, Ph.D., and granting Dr. Goldberg access to Smith's state hospital records.

In March 2011, Smith filed a plea in abatement seeking dismissal of the SVPA Petition based on Dr. Rueschenberg's and Dr. Putnam's post-*Ronje* evaluation reports. The district attorney filed opposition. Judge King set a probable cause hearing for May 6, 2011.

In April 2011, Judge King issued an order denying the pleas in abatement filed by Smith and nine others. Judge King also granted the district attorney's motion to

compel Smith to undergo a mental evaluation and to grant access to his state hospital records.

Five days later, Smith filed his petition for writ of mandate/prohibition. We issued an order to show cause and stayed the trial court proceedings.

DISCUSSION

In *Ronje, supra*, 179 Cal.App.4th 509, we held the use of an invalid assessment protocol in conducting mental evaluations of a person suspected to be a sexually violent predator constituted an error or irregularity in a commitment proceeding under the SVPA. As a remedy, we directed the trial court to order new evaluations pursuant to section 6601 using a valid assessment protocol.

In *Reilly, supra*, ___ Cal.App.4th ___, *Boysel v. Superior Court* (Mar. 28, 2012, G045202) ___ Cal.App.4th ___, and *Wright v. Superior Court* (Mar. 28, 2012, G045203) ___ Cal.App.4th ___, we addressed whether, before the probable cause hearing, a person named in an SVPA commitment petition may challenge the petition on the ground of lack of concurring evaluators, by means of a plea in abatement, nonstatutory motion to dismiss, or nonstatutory pleading. We concluded that *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 912-913 (*Ghilotti*) authorizes the use of a nonstatutory pleading to challenge an SVPA commitment proceeding, before the probable cause hearing, on the ground of lack of the required concurring evaluations. We deem Smith's plea in abatement to have constituted such a nonstatutory pleading.

In *Reilly, Boyssel*, and *Wright*, we addressed the effect of post-*Ronje* evaluations in different scenarios. In *Reilly, supra*, ___ Cal.App.4th ___, the two initial post-*Ronje* evaluators agreed the person named in the SVPA petition no longer met the criteria for commitment as a sexually violent predator, and, therefore, we were compelled by the SVPA to grant the writ petition in that case. In *Boysel, supra*, ___ Cal.App.4th ___, the two initial post-*Ronje* evaluators disagreed whether the person named in the SVPA

commitment petition met the criteria for commitment as a sexually violent predator. Although two independent post-*Ronje* evaluators had been appointed pursuant to section 6601, subdivision (e), their reports were not before the trial court when it denied the challenge to the SVPA commitment petition. In *Wright, supra*, __ Cal.App.4th __, the two initial post-*Ronje* evaluators likewise disagreed whether the person named in the SVPA commitment petition met the criteria for commitment as a sexually violent predator, but there was no evidence in the record that two independent post-*Ronje* evaluators have been appointed. In *Wright* and *Boysel*, we denied the petitions for writ of mandamus/prohibition without prejudice to later renewing the challenge to the SVPA commitment petitions.

This case is similar to *Reilly, supra*, __ Cal.App.4th __, in that both post-*Ronje* evaluators concluded Smith no longer met the criteria for commitment as a sexually violent predator. Appointment of post-*Ronje* independent evaluators was not authorized by section 6601, subdivision (e) because the initial post-*Ronje* evaluators concurred Smith did not meet those criteria. As in *Reilly*, the SVPA Petition could not have been filed based on the two post-*Ronje* evaluations, and therefore, we conclude, now must be dismissed.

As in *Reilly*, we also conclude Smith cannot be compelled to undergo another mental evaluation because the SVPA Petition must be dismissed. Evaluations by independent mental health professionals under section 6601, subdivision (e) are not authorized because the initial two post-*Ronje* evaluators concluded Smith no longer met the criteria for commitment as a sexually violent predator. For the same reason, allowing access to Smith's state hospital records would not be justified.

DISPOSITION AND ORDER

The petition for writ of mandate/prohibition is granted. Let a writ of mandate issue directing the trial court to vacate its order (1) denying Smith's plea in

abatement, (2) granting the district attorney's motion to compel Smith to undergo a mental examination, and (3) granting the district attorney's motion to allow access to Smith's state hospital records, and directing the trial court to enter a new order (1) dismissing the petition seeking commitment of Smith under the SVPA, (2) denying the motion to compel Smith to undergo a mental examination, and (3) denying the motion to allow access to Smith's state hospital records.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.